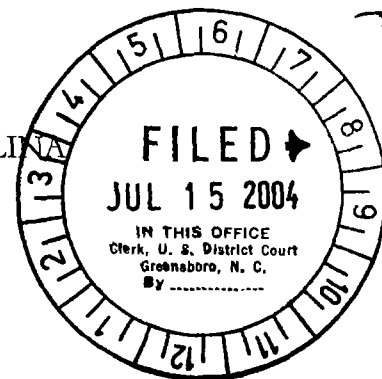


10.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



REBECCA ANN WORTHING f/k/a
REBECCA ANN ROBINSON,

Plaintiff,

v.

JAVED MASOUD, GHAZALA MASOUD,
M & M ASSOCIATES, THE
PRUDENTIAL McCANN REALTY, INC.,
MARGARET STEPHENS AND KAY SHORT,

Defendants.

1:03CV00854

MEMORANDUM OPINION

BEATY, District Judge.

I. INTRODUCTION

This matter comes before the Court on Defendants Margaret Stephens and Kay Short's ("Stephens and Short") and The Prudential McCann Realty, Inc.'s ("Prudential") Motion to Dismiss [Document #5] filed on October 14, 2003.¹ Pursuant to Federal Rule of Civil Procedure 12(b)(6),² Defendants Stephens, Short, and Prudential move to dismiss the following claims in Plaintiff's Complaint [Document #1] as being time barred pursuant to North Carolina General Statutes section

¹ The Court notes that the only issues before the Court at this time are whether certain claims filed against Defendants Stephens, Short, and Prudential are barred by the statute of limitations. Accordingly, the Court's Memorandum Opinion is directed only at the questions raised by these Defendants with respect to whether Plaintiff's claims against them are time barred. The Court will therefore not express any opinion on the merits of the case or the sufficiency with which Plaintiff has or has not pled her claims.

² Although in their Motion to Dismiss Defendants Stephens, Short, and Prudential state that their Motion is brought pursuant to *North Carolina* Rule of Civil Procedure 12(b)(6), it is obvious that because Plaintiff's claims have been brought in federal court, Defendants Stephens, Short, and Prudential have actually brought their Motion pursuant to *Federal* Rule of Civil Procedure 12(b)(6).

1-52 and North Carolina Rule of Civil Procedure 41(a):

1. As to defendants Margaret Stephens and Kay Short, the claims of fraud [sixth claim], negligent misrepresentation [seventh claim] and punitive damages [fourth claim];
2. As to defendant the [sic] Prudential McCann Realty, Inc., all of the plaintiff's claims, with the exception of the plaintiff's Eighth Cause of Action, Unfair and Deceptive Trade Practices.

(Defs.' Mot. Dismiss at 1.)

Plaintiff filed her Brief in Response to Defendants' Motions to Dismiss [Document #9] on October 24, 2003. With respect to Prudential's Motion to Dismiss, Plaintiff disputes Prudential's characterization of Plaintiff's Complaint. While Prudential contends that Plaintiff has asserted her first through seventh claims against it and these claims are time barred, Plaintiff contends that she has not brought any claims against Prudential other than her eighth claim alleging violations of the North Carolina Unfair and Deceptive Trade Practices Act, North Carolina General Statutes section 75-1.1. Thus, Plaintiff states in her brief that "to the extent any claims other than Plaintiff's Unfair and Deceptive Trade Practices claims were inadvertently asserted against [Prudential] in Plaintiff's federal court complaint, Plaintiff certainly consents to the dismissal of those claims, with prejudice." (Pl.'s Br. Resp. Defs.' Mots. Dismiss at 6.) With respect to Defendants Stephens and Short's Motion to Dismiss, Plaintiff contends that her claims for negligent misrepresentation, fraud, and punitive damages are not barred by the statute of limitations.

II. PROCEDURAL HISTORY

The Court notes that this lawsuit stems from an alleged assault on Plaintiff that occurred on September 13, 1999, at rental property Plaintiff was leasing from Defendants. Plaintiff filed a timely complaint (the "Original Complaint") in Alamance County Superior Court on September 13, 2002,

against Defendants Javed Masoud, Ghazala Masoud, M & M Associates, Margaret Stephens, and Kay Short. (Br. Supp. Defs.' Mot. Dismiss [Doc. #6] Ex. A (hereinafter "Original Complaint").) Plaintiff's Original Complaint sought compensatory and punitive damages against all of the then named Defendants³ on the bases of negligence, breach of the implied warranties of fitness and habitability, breach of duty imposed pursuant to North Carolina General Statutes section 42-42(a)(2) to maintain rental property in a fit and habitable condition, and violation of North Carolina General Statutes section 75-1.1. However, pursuant to North Carolina Rule of Civil Procedure 41(a), Plaintiff took a voluntary dismissal of her state-court civil action without prejudice on July 31, 2003. (Br. Supp. Defs.' Mot. Dismiss Ex. B.)

On September 11, 2003, Plaintiff filed the present Complaint in this Court again naming as parties Defendants Javed Masoud, Ghazala Masoud, M & M Associates, Margaret Stephens, and Kay Short.⁴ Plaintiff also named Prudential as a Defendant for the first time in her Complaint in this Court. Defendants Stephens, Short, and Prudential subsequently filed their Motion to Dismiss. Plaintiff alleges that jurisdiction is proper under 28 U.S.C. § 1332 because the parties are diverse and the amount in controversy, exclusive of interest in costs, is in excess of \$75,000. (Compl. ¶ 8.) Plaintiff further alleges that venue is proper under 28 U.S.C. § 1391(a)(1) and (a)(2). (*Id.* ¶ 9.) The issues having been fully briefed by the parties, the Court deems these matters to be ripe for

³ Prudential was not named in Plaintiff's Original Complaint filed in state court.

⁴ Defendants Javed Masoud, Ghazala Masoud, and M & M Associates filed an Answer [Document #8] alleging the statute of limitations as an affirmative defense. These Defendants, however, have not filed a Motion to Dismiss any of Plaintiff's claims as being time barred, and the Motion filed by Defendants Prudential and Stephens and Short does not address whether Plaintiff's claims for punitive damages, fraud, and negligent misrepresentation against the other Defendants should also be dismissed.

adjudication. The Court will therefore first discuss Prudential's Motion to Dismiss claims one through seven against it. The Court will then discuss Stephens and Short's Motion to Dismiss Plaintiff's claims for negligent misrepresentation, fraud, and punitive damages.

III. PRUDENTIAL'S MOTION TO DISMISS

At the time Plaintiff took a voluntary dismissal of her state-court action, Plaintiff had not moved to add Prudential as a defendant in Plaintiff's Original Complaint in state court. Plaintiff instead added Prudential as a defendant when she filed her Complaint in this Court. As stated above, Plaintiff has, pursuant to North Carolina General Statutes section 75-1.1, clearly asserted a claim against Prudential on the basis of Prudential's alleged unfair and deceptive trade practices. This claim has a four-year statute of limitations period, and Prudential has not moved to dismiss this claim as being time barred. See N.C. Gen. Stat. 75-16.2.⁵

Plaintiff does not dispute that, to the extent her Complaint can be read to assert her first through seventh claims against Prudential, these claims are time barred because they are subject to the three-year statute of limitations period set forth in North Carolina General Statutes section 1-52. The Court notes that the three-year limitations period began running by at least September 13, 1999, the date Plaintiff was allegedly attacked. Plaintiff also concedes that because she failed to name Prudential as a defendant in her state-court action, the tolling provision of North Carolina Rule of Civil Procedure 41(a)(1) would not apply to allow any of her first seven claims to proceed against Prudential. The Court notes that North Carolina Rule of Civil Procedure 41(a)(1) provides, in

⁵ The Court notes that, based upon the allegations of Plaintiff's Complaint, it appears that Plaintiff's claim for unfair and deceptive trade practices would not be barred because Plaintiff filed her Complaint in this Court on September 11, 2003, less than four years after she was allegedly attacked on September 13, 1999.

pertinent part, as follows:

[A]n action may be dismissed by plaintiff without order of court If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice . . . a new action based upon the same claim may be commenced within one year.

N.C. R. Civ. P. 41(a)(1) (emphasis added). Rule 41(a)'s tolling provisions apply even where, as here, the plaintiff takes a voluntary dismissal in state court but refiles her claim in federal court. Porter v. Groat, 713 F. Supp. 893, 896–97 (M.D.N.C. 1989). However, in order for Plaintiff “[t]o benefit from the one year extension of the statute of limitation, the second action must be ‘substantially the same, involving the same parties, the same cause of action, and the same right’” Cherokee Ins. Co. v. R/I, Inc., 97 N.C. App. 295, 297, 388 S.E.2d 239, 240 (1990) (second alteration in original) (quoting McIntosh, North Carolina Practice & Procedure § 312, at 187 (1956)).

As previously stated, Plaintiff agrees that she cannot assert a claim against Prudential for any of the claims she raised that are subject to a three-year statute of limitations. Plaintiff therefore contends that the Court should deny Prudential's Motion to Dismiss as moot because Plaintiff is only asserting a claim against Prudential for unfair and deceptive trade practices pursuant to North Carolina General Statutes section 75-1.1, which none of the Defendants have moved this Court to dismiss. Plaintiff further asserts that to the extent that her September 11, 2003, Complaint filed in this Court can be read to assert any claim against Prudential other than a claim pursuant to North Carolina General Statutes section 75-1.1, Plaintiff consents to a dismissal of these claims with prejudice.

Having closely reviewed Plaintiff's Complaint in this Court, the Court finds that certain portions of Plaintiff's Complaint have alleged that Defendant Kay Short was either employed by, acted as the agent of, or committed some acts, conduct, representations, and promises that would

be imputable and chargeable to Defendant Prudential as well as to Defendant Margaret Stephens d/b/a Burlington Rentals. (Compl. ¶¶ 6, 12, 14, 16, 18, 19.) This language could possibly be mistakenly read as if Plaintiff intended to raise specific claims against Prudential by imputing the conduct of others related to the September 13, 1999, assault to Prudential. Therefore, for clarity's sake, rather than denying Prudential's Motion to Dismiss as being moot, the Court deems it advisable to formally grant Prudential's Motion to Dismiss and dismiss with prejudice any and all claims that Plaintiff may have been able to assert against Prudential related to the incident of September 13, 1999, save and except for Plaintiff's sole claim against Prudential for unfair and deceptive trade practices pursuant to North Carolina General Statutes section 75-1.1.

IV. DEFENDANTS MARGARET STEPHENS AND KAY SHORT'S MOTION TO DISMISS

The Court notes that in addition to now asserting her unfair-and-deceptive-trade-practices claim against Prudential in this Court, Plaintiff has also re-asserted against all other Defendants her claims for negligence (first claim), breach of the implied warranties of fitness and habitability (second claim), breach of duty imposed pursuant to North Carolina General Statutes section 42-42(a)(2) to maintain rental property in a fit and habitable condition (third claim), punitive damages (fourth claim), and violation of North Carolina General Statutes section 75-1.1 (eighth claim). Plaintiff has also now specifically asserted claims against all Defendants, except for Prudential, for fraud (sixth claim), negligent misrepresentation (seventh claim), and punitive damages (fourth claim).⁶

⁶ Plaintiff has also now specifically alleged a breach-of-contract claim in her present Complaint. Although Plaintiff's Original Complaint did not specifically assert a breach-of-contract claim, Plaintiff's Original Complaint can be read to fairly state a claim for breach of contract. Because none of the Defendants have challenged Plaintiff's breach-of-contract claim as being barred by the statute of limitations, the Court will not discuss this claim further.

Defendants Stephens and Short have filed a Motion to Dismiss Plaintiff's claims for punitive damages, fraud, and negligent misrepresentation as being barred by the statute of limitations. Defendants Stephens and Short argue that these claims are new claims because they were not alleged in the Original Complaint in state court. Stephens and Short therefore contend that because these are new claims, the three-year statute of limitations applicable to these claims has not been tolled by North Carolina Rule of Civil Procedure 41(a). Accordingly, Stephens and Short argue that because Plaintiff's present Complaint was not filed in this Court until September 11, 2003, and these claims arose no later than September 13, 1999, Plaintiff's claims are time barred.

As discussed above, North Carolina Rule of Civil Procedure 41(a) provides that a plaintiff who takes a voluntary dismissal without prejudice pursuant to that rule may commence "a new action based upon the same claim . . . within one year." The primary dispute between the parties, therefore, is whether Plaintiff's claims of punitive damages, negligent misrepresentation, and fraud meet Rule 41(a)'s requirement that the new action be "based upon the *same* claim[s]." N.C. R. Civ. P. 41(a) (emphasis added). Plaintiff agrees that the rule enunciated in Cherokee Insurance Co. controls the resolution of this case so that in order for Plaintiff "[t]o benefit from the one year extension of the statute of limitation, the second action must be substantially the same, involving the same parties, the same cause of action, and the same right." 97 N.C. App. at 297, 388 S.E.2d at 240 (internal quotations omitted). Plaintiff, however, disagrees with Stephens and Short's contentions that Plaintiff's claims for fraud, negligent misrepresentation, and punitive damages do not meet Rule 41(a)'s "same claim" requirement, that is, Plaintiff argues that these claims are not new claims that were not part of her Original Complaint filed in state court. Having closely reviewed Plaintiff's Original Complaint and the present Complaint, the Court finds that Plaintiff's

present Complaint does not raise new claims but rather the Original Complaint can be fairly read to have included claims against Defendants Margaret Stephens and Kay Short for punitive damages, negligent misrepresentation, and fraud. The Court will address each of Plaintiff's claims in turn.

A. Punitive Damages (Fourth Claim)

With respect to Plaintiff's claim for punitive damages, Plaintiff contends that she did in fact request punitive damages in her Original Complaint. Plaintiff points out that paragraph 21 of the Original Complaint states the following with respect to punitive damages:

21. The failure and refusal of Defendants JAVED MASOUD, GHAZALA MASOUD, M & M ASSOCIATES, MARGARET STEPHENS and KAY SHORT to correct the unsafe and hazardous conditions of the rental property as alleged herein, after having received actual notice of the unsafe and hazardous conditions, and after having specifically represented to and promised Plaintiff on numerous occasions that the unsafe and dangerous conditions would be repaired, constitutes intentional, malicious, willful and wanton conduct on the part of Defendants JAVED MASOUD, GHAZALA MASOUD, M & M ASSOCIATES, MARGARET STEPHENS and KAY SHORT that was done in disregard and indifference to the rights and well being of Plaintiff and for the financial gain of Defendants JAVED MASOUD, GHAZALA MASOUD, M & M ASSOCIATES, and MARGARET STEPHENS. Therefore Defendants JAVED MASOUD, GHAZALA MASOUD, M & M ASSOCIATES, MARGARET STEPHENS and KAY SHORT are liable to Plaintiff for punitive damages in an amount to be proven at trial, but which amount is in excess of Ten Thousand Dollars (\$10,000).

(Original Compl. ¶ 21.) Defendants Stephens and Short did not reply to Plaintiff's argument that the Original Complaint does in fact raise a claim for punitive damages. The Court finds that the Original Complaint clearly states a claim for punitive damages against Stephens and Short. For that reason, Stephens and Short's Motion to Dismiss Plaintiff's claim for punitive damages in the Complaint filed in this Court must be denied.

B. Negligent Misrepresentation (Seventh Claim)

Defendants further contend that Plaintiff failed to bring her negligent misrepresentation

claim in her Original Complaint and therefore this claim is time barred. In her claim for negligent misrepresentation, Plaintiff alleges the following:

38. The false representations, statements and assurances of Defendants JAVED MASOUD, GHAZALA MASOUD, M & M ASSOCIATES, MARGARET STEPHENS and KAY SHORT as alleged herein constitute negligent and careless misrepresentations of material facts which Plaintiff actually and justifiably relied upon to her detriment. Defendants made the false representations, statements and assurances alleged herein for the [purpose] of inducing Plaintiff]] to remain a tenant in Defendants' rental property and were made by Defendants in connection with a commercial transaction in which Defendants had a pecuniary interest.

(Compl. ¶ 38.)

The Court, however, again finds that Plaintiff's Original Complaint can be fairly read to state a claim for negligent misrepresentation against Defendants Stephens and Short. In paragraph 15 of Plaintiff's Original Complaint, Plaintiff alleged the following:

15. Immediately subsequent to taking occupancy of the rental property, and immediately subsequent to her discovery of the above-described defects and dangerous conditions, Plaintiff, in late August, 1999, began telephoning Defendants, through Defendant KAY SHORT, to request the immediate repair of the defects and dangerous conditions in the rental property alleged and described herein. In response to each of Plaintiff's numerous and repeated telephone calls, Defendant KAY SHORT stated to Plaintiff that all Defendants were aware of the above-described defects and dangerous conditions, that she had specifically informed Defendants MARGARET STEPHENS, JAVED MASOUD, GHAZALA MASOUD, or M & M ASSOCIATES, of the above-described defects and dangerous conditions and that she had requested these Defendants to make immediate repairs of the defects. In response to each of Plaintiff's telephone calls, Defendant KAY SHORT specifically promised and represented to Plaintiff that Defendants would immediately correct and repair all of the above-described defects and dangerous conditions, none of which were ever addressed or repaired prior to September 13, 1999.

(Original Compl. ¶ 15.)

Paragraph 17 of the Original Complaint makes it even clearer that Plaintiff's previously raised negligence claim was based in part on the promises and representations that Defendants

Stephens and Short made to Plaintiff on behalf of the other Defendants. Specifically, paragraph 17 of the Original Complaint states the following:

17. Defendants JAVED MASOUD, GHAZALA MASOUD, M & M ASSOCIATES, MARGARET STEPHENS AND KAY SHORT were negligent in that they:

- a. Failed to maintain the rental property in a reasonably safe condition for Plaintiff and others using the premises;
- b. Failed to correct unsafe conditions about which they had actual knowledge;
- c. Failed to correct the defects and dangerous conditions alleged herein;
- d. Despite receiving actual notice of the hazardous and unsafe conditions alleged herein, and despite *making numerous promises to make repairs, they failed to take reasonable action to correct the conditions*;
- e. Failed to adequately and properly inspect the rental property; and
- f. Engaged in other acts and conduct constituting actionable negligence which shall be proven at trial.

(Original Compl. ¶ 17 (emphasis added).)

Plaintiff therefore contends that her claim for negligent misrepresentation in the Complaint before this Court is not much different from, if not the same as, the claim she asserted in the Original Complaint, in which she alleged that Defendants breached their statutory duty to provide Plaintiff with safe, fit, and habitable housing. Plaintiff specifically argues that her present Complaint's allegation of negligent misrepresentation is based upon Defendants' conduct of making false promises to immediately make the necessary repairs that North Carolina General Statutes section 42-42(a)(2) required Defendants to provide in order for Plaintiff to have safe, fit, and habitable housing. It can be fairly read into Plaintiff's negligence allegations in paragraph 17 of Plaintiff's Original Complaint that Plaintiff believed that Defendants made these "*numerous promises to make repairs*" for the purpose of inducing her to remain in Defendants' rental property to their economic benefit and to her detriment. For this reason, the Court finds that Plaintiff's claim of

negligent misrepresentation in the present Complaint is not a new claim. The Court therefore finds that Defendants Stephens and Short's Motion to Dismiss Plaintiff's negligent misrepresentation claim in the Complaint before this Court must be denied.

C. Fraud (Sixth Claim)

Stephens and Short further contend that Plaintiff did not raise a claim for fraud in her Original Complaint and therefore Plaintiff's claim for fraud in her present Complaint is barred by the statute of limitations. In support of this argument, Stephens and Short rely upon various cases that hold that "[a] claim for fraud is fundamentally different from a claim for negligence" Stanford v. Owens, 76 N.C. App. 284, 289, 332 S.E.2d 730, 733 (1985); accord Strawbridge v. Sugar Mountain Resort, Inc., 243 F. Supp. 2d 472, 478 (W.D.N.C. 2003) (citing Stanford). Plaintiff concedes that if she had merely brought negligence claims in her previous Complaint, she would not now be able to assert a claim for fraud. Plaintiff argues, however, that her fraud claim in the Complaint before this Court is essentially the same as the unfair-and-deceptive-trade-practices claim she raised in paragraph 22 of her Original Complaint. Paragraph 22 of the Original Complaint stated the following:

22. The failure and refusal of Defendants JAVED MASOUD, GHAZALA MASOUD, M & M ASSOCIATES and MARGARET STEPHENS to correct the unsafe and hazardous conditions of the rental property, after having received actual notice that the rental property was in an unsafe and hazardous condition, *and after having made numerous representations and promises to Plaintiff that the unsafe and hazardous conditions would be repaired*, and the failure and refusal of Defendants JAVED MASOUD, GHAZALA MASOUD, M & M ASSOCIATES and MARGARET STEPHENS to maintain the rental property in a safe, fit and habitable condition, is conduct in and affecting commerce and constitutes violations by these Defendants of the North Carolina Unfair and Deceptive Practices Act, N.C.G.S. §75-1.1 et seq. Plaintiff has been damaged by Defendants' violations of the North Carolina Unfair and Deceptive Trade Practices Act, N.C.G.S. §75-1.1, et seq. [sic] in an amount to be proven at trial, but which amount is in excess of Ten Thousand Dollars (\$10,000), and therefore, Plaintiff is entitled to recover of these Defendants, jointly and

severally, compensatory damages, treble damages and attorneys [sic] fees.

(Original Compl. ¶ 22) (emphasis added).)

In comparison, the fraud claim in Plaintiff's Complaint before this Court is found in paragraphs 33–36 of the present Complaint. In particular, paragraph 34 of the present Complaint states the following:

34. Defendants JAVED MASOUD, GHAZALA MASOUD, M & M ASSOCIATES, MARGARET STEPHENS and KAY SHORT knowingly, willfully and intentionally falsely represented to Plaintiff, with the specific intent to defraud Plaintiff, that the above described repairs would be made to the rental property. *These were material misrepresentations of fact which Defendants knew to be false and which Plaintiff believed, upon which Defendants intended Plaintiff to rely and upon which Plaintiff reasonably relied in making her decision to remain in Defendants' rental property.*

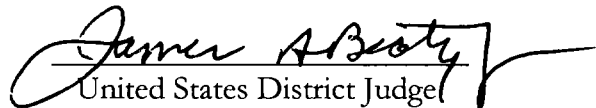
(Compl. ¶ 34 (emphasis added).) Plaintiff has therefore clearly alleged a claim of fraud in her present Complaint. The Court finds that the allegations in Plaintiff's present Complaint are not fundamentally different from Plaintiff's claim of unfair and deceptive trade practices as alleged in paragraph 22 of her Original Complaint. In any event, it is undisputed that fraud can be an unfair and deceptive trade practice for the purpose of North Carolina General Statutes section 75-1.1. As a part of both Plaintiff's claim for fraud in the present Complaint and Plaintiff's claim for unfair and deceptive trade practices in the Original Complaint, it is clear that it was Plaintiff's intention to seek redress for her injuries due to the alleged false and fraudulent statements by Defendants that repairs would be made to correct the dangerous conditions at the rental property Defendants leased to Plaintiff. Therefore, to the extent that Plaintiff has alleged that Defendants Stephens and Short's conduct amounted to a fraud upon Plaintiff, it would also qualify as an unfair and deceptive trade practice which Plaintiff clearly alleged in her Original Complaint. For the foregoing reasons, therefore, the Court finds that Defendants Stephens and Short's Motion to Dismiss must be denied

to the extent it seeks dismissal of Plaintiff's present allegation of fraud as being a different claim from the unfair-and-deceptive-trade-practices claim that Plaintiff alleged in her Original Complaint. In other words, the Court finds, based upon a comparison of the allegations of Plaintiff's present Complaint with the allegations of her Original Complaint, that Rule 41(a) applies and tolls the statute of limitations with respect to Plaintiff's claim for fraud.

V. CONCLUSION

In summary, therefore, the Court will grant Prudential's Motion to Dismiss [Document #5] Plaintiff's Complaint. Accordingly, save and except for Plaintiff's claim against Prudential for unfair and deceptive trade practices pursuant to North Carolina General Statutes section 75-1.1, all other claims that Plaintiff may have asserted against Prudential in her present Complaint are hereby dismissed with prejudice as being barred by the statute of limitations. However, for the reasons stated herein, the Court will deny Defendants Stephens and Short's Motion to Dismiss [Document #5] Plaintiff's claims for punitive damages, negligent misrepresentation, and fraud because, based upon the allegations in Plaintiff's present Complaint, North Carolina Rule of Civil Procedure 41(a) applies and tolls the statute of limitations with respect to these claims. An Order consistent with this Memorandum Opinion shall be filed contemporaneously herewith.

This, the 15th day of July, 2004.


United States District Judge